IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.170 OF 1977

Maharashtra Small Scale Industries Development Corpn. Ltd. ..Plaintiffs

Vs.

Bhagat Engineering Co.P.Ltd. ..Defendants

None for the plaintiffs

Mr.Devrath Singh i/b Thakordas and Madgaonkar for the defendants

Mr.G.T.Mestha, Commissioner for taking accounts presemt

CORAM : S.U.KAMDAR, J
DATED : 10TH MARCH, 2006

P.C.:

1. By an order dt.15.7.96 it is recorded between the parties that the issues except issue nos.1, 11 and 12 are given up. Accordingly the counter claim of the defendants has been given up and is not pressing for the same. Issue nos.1, 11 and 12 were referred to the Commissioner for taking accounts by the said order. Commissioner has after recording evidence filed a report being report dt.25.8.05. The said report is taken on record.

The said issues which were referred to the Commissioner for recording evidence are as under:

> "(1) Whether the defendants have not been given credit for Rs.44,770/- and Rs.68,011.93 as alleged in paragraph 2 of the Written Statement.
>
> (11) Whether the amounts set out in para 6 of the plaint are due and payable by the defendants to the plaintiffs as alleged in para 6 of the plaint.
>
> (12) Whether the particulars of the amounts mentioned in Exhibits 12 to 3 reflect the correct composition of the accounts as alleged in para 16 of the Written Statement.

2. The Commissioner after filing evidence between the parties for recording evidence has given a finding that in so far as issue No.1 is concerned, defendants are able to prove that in respect of two amounts of Rs.44,770/- and Rs.68,011.93 they have been able to establish that they have not been given credit by the plaintiffs. In so far as issue nos.11 and 12 are concerned, the Commissioner has given a finding that both the aforesaid issues are not proved both by the plaintiffs and defendants respectively. Issue no.11 was required to be proved by the plaintiffs

since the burden of proof is on the plaintiffs to establish that the amount set out in para 6 of the plaint are due and payable by the defendants to the plaintiffs.

3. In so far as issue no.12 is concerned, defendants have contended that the amount mentioned in Exhibit nos. 1, 2 and 3 to their written statement actually reflects the correct position of accounts. However, defendants have failed to establish their accounts as well as the plaintiffs have also failed to establish their accounts. In the present suit, the claim is by the plaintiffs on the foot of the account for the recovery of certain amount under the dealership agreement. Defendants have not made any counter claim as excess amount paid towards the said account. Thus, in my opinion, though the defendants have been able to establish that the credit is not given of Rs.44,770/- and Rs.68,011.93, he cannot claim the said amount. At the highest, the plaintiffs are bound and liable to give adjustment to the said two credits from the claim made in the present suit but the plaintiffs themselves have not been able to

establish any amount in the present suit. Thus, the suit is liable to be dismissed.

4. The learned counsel for the defendants have claimed that there should be a decree in his favour for the amount of Rs.44,770/- and Rs.68,011.93 and for the sum of Rs.4,09,771.95. I am afraid it is not possible to pass any such decree. Firstly, there is no claim made by the defendants for any excess amount paid by the defendants to the plaintiffs and / or that the plaintiffs are liable to refund of the said amount. Furthermore, the only defence which has been raised was in respect of certain adjustment which the plaintiffs have not given and according to the defendants that adjustments were required to be given and the amount as claimed by the plaintiffs is not due and payable by the defendants to the plaintiffs herein. Except the aforesaid 3 entries, he has not been able to establish any claim in his favour nor he has been able to able to establish various other entries as mentioned in para 16 of the written statement. On plain reading of para 16 of the written statement, it is clear that the only

defence which has been raised is that the accounts contains certain inaccuracy and the objections in respect thereof, was raised in the light of the letters dt.17.8.74 and 12.9.74. There is also a dispute raised pertaining to the accrual of interest amount. On perusal of entire para 16 of the written statement, it is clear that there is no claim of any nature whatsoever made in the written statement as receivable by him at the foot of the account.

5. In my opinion, thus it is not possible to pass nay decree in favour of the defendants herein. The plaintiffs' case is that plaintiffs have failed to establish their case on the basis of evidence laid by the plaintiffs before the Commissioner. In that light of the matter, suit must fail and the same is dismissed accordingly. The learned counsel for the defendants does not press the counter claim which is only for damages and accordingly counter claim is allowed to be withdrawn. Defendants will be entitled to refund of court fee as per rules in respect of the counter claim.